No. 03-123

Supreme Court, U.S.
FILED
OCT 8 - 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

BLUE RIBBON COALITION, et al.,

Petitioners,

v.

MONTANA WILDERNESS ASSOCIATION, et al.,

and

UNITED STATES FOREST SERVICE, et al.,

and

MIDDLE FORK PROPERTY OWNERS ASSOCIATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

PAUL A. TURCKE
MOORE SMITH BUXTON & TURCKE, CHARTERED
225 North 9th Street, Suite 420
Boise, ID 83702
208-331-1807

Counsel of Record for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

14 pp

TABLE OF CONTENTS

	Page
Introduction	1
Reasons for Granting the Petition	1
A. The Important Public Issues Presented and Judicial and Administrative Economy Justify this Court's Review of the Decision Below	1
B. The Decision Below is Inconsistent, if Not in Conflict, with Decisions of this Court and Other Circuits	5
C. Respondents' Jurisdictional Vision Would Dramatically Expand APA Review	7
Conclusion	10

TABLE OF AUTHORITIES

Page

CASES

Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) 8

Assoc. of Civilian Technicians v. Federal Labor Relations Authority, 283 F.3d 339 (D.C. Cir. 2002) 6, 9

Butz v. Economou, 438 U.S. 478 (1978) 3

Ecology Center v. U.S. Forest Service, 192 F.3d 922 (9th Cir. 1999) 5, 6, 9

Florida Power & Light Co v. Lorion, 470 U.S. 729 (1985) 4

Forsyth v. Hammond, 166 U.S. 506 (1897) 2

Gillespie v. U.S. Steel Corp., 379 U.S. 148 (1964) 2

Heckler v. Chaney, 470 U.S. 821 (1985) 8

Iowa ex rel. Miller v. Block, 771 F.2d 347 (8th Cir. 1985) 8

Land v. Dollar, 330 U.S. 731 (1947) 2

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) 2

Lujan v. National Wildlife Federation, 497 U.S. 871 (1990) 3, 5

Mastrapasqua v. Shaughnessy, 180 F.2d 999 (2d Cir. 1950) 8

NAACP v. Secretary of Housing and Urban Development, 817 F.2d 149 (1st Cir. 1987) 3, 7, 8

Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977) 3

ONRC Action v. BLM, 150 F.3d 1132 (9th Cir. 1998).....5, 6

TABLE OF AUTHORITIES – Continued

Page

Public Citizen Health Research Group v. Commissioner, Food & Drug Admin., 740 F.2d 21 (D.C. Cir. 1984) 8, 9

Sierra Club v. Peterson, 228 F.3d 559 (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) 5, 9

Southern Utah Wilderness Alliance v. Norton, 301 F.3d 1217 (10th Cir. 2002) 4, 9

St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978) 2

United States v. General Motors Corp., 323 U.S. 373 (1944) 2

Virginia Military Institute v. United States, 508 U.S. 946 (1993) 1

FEDERAL REGULATIONS

36 C.F.R. § 219.21 6

36 C.F.R. part 295 6

INTRODUCTION

This case asks the Court to consider the manner in which federal courts may review agency "inaction" under the Administrative Procedure Act (the "APA"). The Court should grant the petition for certiorari to consider whether one may bypass "traditional" APA section 706(2) review of final agency action by framing theirs as an APA section 706(1) claim targeting agency "inaction." This case presents important jurisdictional issues that will not benefit from further activity in the lower courts. Circuit Courts split on the jurisdictional analysis, and the new approach created by the Ninth Circuit's decision here will dramatically expand and alter traditional APA jurisdictional review, with broad ramifications for executive branch administrative agencies, federal courts, and interested members of the public. This Court should hear this case to define and clarify the proper boundaries of APA section 706(1) review.

REASONS FOR GRANTING THE PETITION

A. The Important Public Issues Presented and Judicial and Administrative Economy Justify this Court's Review of the Decision Below.

Nothing about the procedural context of this case diminishes the need for this Court to offer guidance on the fundamental APA jurisdictional issues presented. Respondents argue this Court "has a long tradition" of refusing to hear cases "that 'await final judgment in the lower courts.'" Br. in Op. 12 (citing *Virginia Military Institute v. United States*, 508 U.S. 946 (1993)). Respondents argue further proceedings below might "moot" or "alter" the

issues brought for review before this Court. *Ibid.* These arguments are not correct.

This Court has often heard cases which were not fully or finally resolved in the lower courts. Respondents' concerns were considered and rejected in *Forsyth v. Hammond*, 166 U.S. 506 (1897), in which Justice Brewer noted that the petition identified several conflicts, and concluded "although no final decree has been entered, it seemed to us a duty to bring the case and the question here for examination at the earliest possible moment." *Id.* at 515. The Court further noted the power of certiorari "extends to every case pending in the circuit courts of appeal, and may be exercised at any time during such pendency. . . . " *Id.* at 514. Later decisions of the Court clarify that review of a nonfinal judgment is appropriate when the issue involved is "fundamental to the further conduct of the case." *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1944); see also *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 153-154 (1964); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 743 n.3 (1947). Several cases, including *Land* and *Larson*, involved procedural contexts similar to this case, in which trial court rulings resolving the case were reversed in the court of appeals and the case remanded for trial.

Additionally, the Court has often, without specifically mentioning the "fundamental to further conduct" rationale, granted certiorari to consider important issues presented through cases involving circuit court decisions reversing the district court and remanding the case for trial or further proceedings. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 536 (1978) (petition granted "[t]o resolve the conflicting interpretations of [Sherman

Act] adopted by several Courts of Appeals"); *Butz v. Economou*, 438 U.S. 478, 480-481 (1978) (certiorari granted in case involving governmental immunity "[b]ecause of the importance of immunity doctrine to both the vindication of constitutional guarantees and the effective functioning of government. . . . "); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 358 (1977) (involving Ninth Circuit reversal of trial court's decision awarding summary judgment for defendants). The Court certainly has discretion to grant the petition(s) and review the Ninth Circuit's decision here.

This case fits well within the cases outlined above and there are numerous reasons why the Court should grant certiorari here. The rights at issue are certainly public rights, framed in the geographical context of the Nation's diverse and voluminous public lands. The APA principles at issue are of even broader importance, because the APA provides the jurisdictional starting point for nearly all judicial review of agency action, since "there is hardly ever any need for Congress" to create "a private right of action against the *federal* government. . . . " *NAACP v. Secretary of Housing and Urban Development*, 817 F.2d 149, 152 (1st Cir. 1987) (italics in original); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 882 (1990) (explaining that where there is "no specific authorization in the substantive statute" review proceeds under the APA). As pointed out by Petitioners here and in Nos. 02-1703, 03-101, and 03-109, there is substantial confusion, if not direct conflict, between varied circuit and district courts over the correct treatment of the APA section 706(1) cause of action.

There is little question that resolution of this issue is "fundamental to further conduct of the case." Respondents contend that "the only issue" decided by the Ninth Circuit

is that the district court "may consider Respondents' § 706(1) claims." Br. in Op. 13. Actually, the district court already considered and agreed with Respondents' section 706(1) claims, but the Ninth Circuit, in a dramatic departure from the "record review" of a typical APA case, determined a *trial* must be held so that the district judge, apparently sitting as a finder of fact, can determine whether or to what extent the Forest Service has satisfied its duty under the Montana Wilderness Study Act to maintain wilderness character and potential for inclusion. But see *Florida Power & Light Co v. Lorion*, 470 U.S. 729, 743-744 (1985) (explaining focal point for judicial review is administrative record relied upon by agency). Petitioners contend that Respondents' efforts fail to properly invoke the district court's jurisdiction, while the Ninth Circuit decision not only allows the action to continue but dictates that a trial is necessary to resolve this case. This trial will likely consider the 1977 and present "wilderness character and potential for inclusion" of "nearly one million acres of land in Montana." Br. in Op. 1-2. Such a trial presents a daunting and unprecedented undertaking in an APA case. Given the Ninth Circuit's direction on remand, there appears little opportunity to renew or refine Petitioners' jurisdictional questions. None of Respondents' concerns diminish the need for guidance from this Court on the proper interpretation of APA section 706(1) jurisdiction.

Beyond this case, it would disserve judicial and administrative economy for this Court to delay review. As explained in the Petition(s) here and in No. 02-1703, the Ninth Circuit's decision and the Tenth Circuit's decision in *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217 (10th Cir. 2002), are already being applied to allow expanded review of ongoing agency activity under APA

section 706(1). Rather than forcing the parties in these and other cases to endure ongoing confusion, it far better serves the interests of all involved to grant review here to better define the nature of judicial review of agency inaction.

B. The Decision Below is Inconsistent, if Not in Conflict, with Decisions of this Court and Other Circuits.

The Ninth Circuit's decision cannot be squared with prior decisions of this Court, its own prior decisions, and those of other Circuit Courts of Appeals. Respondents' attempts to distinguish *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) and *Sierra Club v. Peterson*, 228 F.3d 559 (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) are unpersuasive. Respondents argue that these cases involved efforts to "lump together" discrete actions and challenge them all "as one large 'program'" as opposed to Respondents' challenge to the Forest Service's alleged "failure to comply with a specific statutory mandate. . . . " Br. in Op. 17. Respondents ignore the fundamental unifying factor: each case focuses on broad geographic areas and broad legal duties, *not* on any discrete *final agency action* applying the legal duty to the broad geographic area targeted in the complaint. *Lujan* counsels, at least where the agency has acted on the legal duty at issue, that a focus on "a specific 'final agency action' [that] has an actual or immediately threatened effect . . . " is the "traditional . . . and normal, mode of operation of the courts." *Lujan*, 497 U.S. at 894.

Respondents entirely ignore the Ninth Circuit decisions in *ONRC Action v. BLM*, 150 F.3d 1132 (9th Cir. 1998) and *Ecology Center v. U.S. Forest Service*, 192 F.3d

922 (9th Cir. 1999). The D.C. Circuit Court of Appeals employed the same reasoning as *Ecology Center* to affirm dismissal of section 706(1) challenges reflecting "nothing more than substantive disagreement with the agency's legal rulings." *Assoc. of Civilian Technicians v. Federal Labor Relations Authority*, 283 F.3d 339, 344 (D.C. Cir. 2002). Respondents similarly ignore *ONRC Action*, in which the Ninth Circuit affirmed a district court dismissal of a section 706(1) claim based on statutory duties similar to the one in this case, finding that the duties in question were not the type of "clear statutory duty" subject to a proper section 706(1) claim. *ONRC Action*, 150 F.3d at 1139 and n.7.

Respondents finally argue that their case is distinguishable because they "allege (and have shown) that substantial impairment of the wilderness study areas already is occurring, virtually always without any formal action being taken by the Forest Service." Br. in Op. 18. Respondents seemingly argue that the vehicle access to which they object is occurring in the absence of *any* agency action. This statement is incorrect. *All* vehicle access on Forest Service lands flows from *some* agency decision. Contrary to Respondents' implication, there is no general presumption allowing unrestricted, or any, vehicular access to WSAs or any Forest Service lands. The Forest Service authorizes and restricts vehicle access through a public planning process. 36 C.F.R. § 219.21 (Forest Plan); 36 C.F.R. part 295 (travel plan). Respondents may now be dissatisfied with their failure to challenge *past* decisions to authorize use, and are sufficiently experienced to understand the difficulty of succeeding in a section 706(2) "arbitrary and capricious" challenge to the agency's chosen

balance in Forest Plan or travel management plan decisions. Rather than identifying the absence of an opportunity for judicial review of Forest Service vehicle access decisions, Respondents hope through section 706(1) to create a new, broader and easier method of review.

C. Respondents' Jurisdictional Vision Would Dramatically Expand APA Review.

Respondents' view, now endorsed by at least two Ninth Circuit panels, would allow creative private interests to subject federal land management agencies to perpetual litigation challenging the agencies' failures to take "complete" action on broad and discretion-laden duties. Such is not the result of "established principles of judicial review under the APA," but would represent a profound "paradigm shift" in the relationship between the judiciary and executive branch agencies. Br. in Op. 20.

Respondents cite several decisions in characterizing theirs as a typical challenge under section 706(1). Br. in Op. 22-23. Careful analysis of these decisions reveals they are distinguishable and only amplify the confusion surrounding section 706(1) and the resulting need for guidance from this Court. First on this list is *NAACP v. Secretary of Housing and Urban Development*, 817 F.2d 149 (1st Cir. 1987). *NAACP* must be considered in light of the unique statutory language at issue, in which Congress specifically directed the Department of Housing and Urban Development must act "in a manner affirmatively to further" the policies of the Fair Housing Act. *Id.* at 151. More importantly, the First Circuit's decision seemingly turns on the analogy to cases finding section 706(1) can be used to compel an official " 'to exercise his discretion where

he has obviously failed or refused to do so.'" *Id.* at 160 (quoting *Mastrapasqua v. Shaughnessy*, 180 F.2d 999, 1002 (2d Cir. 1950)). Thus, *NAACP* only reaffirms the principle that section 706(1) can be used to challenge a total failure to act, but offers no guidance on the central issue of this case, namely, whether allegations that an agency has only *partially* discharged a statutory duty can constitute a viable section 706(1) claim.

This distinction also covers Respondents' additional cited authority. For instance, *Iowa ex rel. Miller v. Block*, 771 F.2d 347 (8th Cir. 1985) is clearly a "total inaction" instead of a "partial inaction" case, for the court there compared the situation at issue to "the Secretary's failure to implement a program entirely, not simply his failure to grant aid in a particular case . . . " and "regard[ed] this fact as the essential point distinguishing . . . *Heckler v. Chaney*, 470 U.S. 821 (1985). . . . " *Id.* at 350 and n.2. Similarly, *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) involved allegations that the agency "has consciously and expressly adopted a general policy which is in effect an abdication of its statutory duty." *Id.* at 1162. Finally, Respondents' cited section of *Public Citizen Health Research Group v. Commissioner, Food & Drug Admin.*, 740 F.2d 21 (D.C. Cir. 1984) only endorses judicial intervention via section 706(1) when an agency has utterly abdicated a statutory duty to act or is "lag[ging] unreasonably" in reaching *any* decision. *Id.* at 32. *Public Citizen* involved a challenge to FDA's failure to reach any decision on a petition alleging aspirin products must carry a warning about Reye's Syndrome. Despite the agency's failure to take timely action, the D.C. Circuit Court of Appeals held that "respect for the integrity of the administrative process . . . precludes judicial review, prior to a

definitive agency resolution" of the petition. *Id.* at 35. In short, none of these cases add anything beyond the rule summarized in *Ecology Center v. U.S. Forest Service*, 192 F.3d 922, 926 (9th Cir. 1999), requiring a proper section 706(1) claim to target a "genuine failure to act."

There is no "genuine failure to act" in this case. The Forest Service has not abdicated its duty to regulate human and vehicle access or to maintain wilderness character. The agency has expended countless hours and dollars issuing numerous decisions authorizing and restricting vehicle access in Montana's National Forests and the WSAs at issue. Pet. Br. 12-13. Counsel skillfully maneuvers around this fact, acknowledging only that the alleged impairment of WSAs "is occurring, *virtually always without* any formal action being taken by the Forest Service." Br. in Op. 18 (emphasis added). In short, Respondents can only dispute the degree and sufficiency of agency action taken, but cannot identify its absence. Such claims should be barred by the "genuine failure to act" rule of *Ecology Center*, *Peterson*, and *Civilian Technicians*.

If Respondents are correct, any section 706(1) claim survives jurisdictional scrutiny if framed as a challenge to "partial" compliance with a statutory duty. Until the Ninth Circuit's decision here and the Tenth Circuit's decision in *Southern Utah Wilderness Alliance*, no court has adopted Respondents' interpretation of section 706(1). At most, Respondents' cited authority demonstrates the confusion in the lower courts and provides fodder for presenting the merits of this case to the Court. This Court should grant certiorari to consider the important and timely questions concerning the proper nature of APA section 706(1) review.

CONCLUSION

For the reasons stated above, and in the petitions for writ of certiorari in this matter and in No. 02-1703, the Petition for a Writ of Certiorari should be granted, or, alternatively, held for disposition in light of a decision in Nos. 02-1703 and 03-101.

Respectfully submitted,

PAUL A. TURCKE
MOORE SMITH BUXTON & TURCKE, CHARTERED
225 North 9th Street, Suite 420
Boise, ID 83702
208-331-1807

Counsel of Record for Petitioners